

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KATHLEEN KIMBER
Claimant

VS.

U.S.D. No. 418
Respondent

AND

KANSAS ASSOCIATION OF SCHOOL BOARDS
Insurance Carrier

Docket No. 169,842

KATHLEEN KIMBER
Claimant

VS.

THE CEDARS, INC.
Respondent

AND

**KANSAS ASSOCIATION OF HOMES
FOR THE AGING INSURANCE GROUP, INC.**
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 172,282

ORDER

This matter comes before the Appeals Board for review of an Award entered by Administrative Law Judge George R. Robertson on August 24, 1994 from the appeals of the claimant, the respondents and the Kansas Workers Compensation Fund.

APPEARANCES

Claimant appeared by and through her attorney Rodney G. Nitz of Salina, Kansas. Respondent, U.S.D. No. 418, and its insurance carrier, Kansas Association of School Boards, appeared by and through their attorney Anton C. Andersen of Kansas City, Kansas. Respondent, The Cedars, Inc., and its insurance carrier, Kansas Association of Homes for the Aging Insurance Group, Inc., appeared by and through their attorney Jeffrey A. Chanay of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney David G. Shriver of McPherson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Docket No. 169,842

(Alleged Date of Accident May 2, 1991)

- (1) Whether claimant suffered accidental injury on the date alleged.
- (2) What, if any, is the nature and extent of claimant's injury and/or disability?
- (3) Claimant's entitlement to future medical treatment.
- (4) Whether the Administrative Law Judge has erred in ordering respondent The Cedars, Inc. and its insurance company to reimburse respondent U.S.D. No. 418 and its insurance company for amounts previously expended by respondent U.S.D. No. 418 and its insurance company.

Docket No. 172,282

(Alleged Date of Accident May 15, 1992)

- (1) Whether claimant suffered accidental injury on the date alleged.
- (2) The nature and extent of claimant's injury and/or disability.
- (3) Whether the respondent and/or the Workers Compensation Fund are entitled to a credit pursuant to K.S.A. 44-510a.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was a custodial employee for U.S.D. No. 418 from 1985 through June 1991. For approximately the last two years of her employment with U.S.D. No. 418 claimant complained of bilateral hand and wrist symptomatology. On May 2, 1991,

claimant suffered a fall which resulted in a temporary aggravation of her bilateral upper extremity symptomatology. In June 1991, claimant's employment with U.S.D. No. 418 was terminated.

Claimant first sought medical treatment with Dr. David Peterson on October 30, 1991. At that time Dr. Peterson diagnosed mild carpal tunnel syndrome from his clinical examination but noted the EMGs performed on claimant were normal. Dr. Peterson did not again examine claimant until December 1992, at which time her carpal tunnel symptomatology had significantly worsened and EMGs were then positive. He recommended surgical treatment for claimant's carpal tunnel condition. Claimant underwent a carpal tunnel release on her right upper extremity on January 26, 1993 with a good result. Claimant then underwent a left carpal release on March 3, 1993, again with a good result. Inbetween Dr. Peterson's first examination in October 1991 and his second examination in December 1992, claimant began working for The Cedars, again in a custodial and housekeeping occupation. Dr. Peterson acknowledged that claimant's symptomatology was aggravated by her work with The Cedars. When specifically asked what, if any, functional impairment the claimant had developed, Dr. Peterson, in amending his original opinion, assessed claimant a 15 percent whole body functional impairment due to claimant's upper extremity complaints. Dr. Peterson's original report rated claimant at only 12 percent to the body as a whole but he opined additional thenar atrophy suffered by claimant was justification for the increase in functional impairment.

While Dr. Peterson's history of claimant's employment did indicate an 18-month history of symptomatology before he had the opportunity to examine her in 1991, he was unable to say within a reasonable degree of medical probability what, if any, percentage of functional impairment preexisted claimant's employment at The Cedars. When specifically asked about the functional impairment stemming from claimant's May 2, 1991 fall and her preexisting symptoms, Dr. Peterson advised it would be difficult if not impossible to assess a functional impairment to that period of time separate from claimant's employment at The Cedars.

Claimant was also examined and treated over a significant period of time by Dr. J. Mark Melhorn. Dr. Melhorn first examined claimant on November 19, 1991 and was provided a two-year history of carpal tunnel symptomatology. After testing claimant and reviewing EMGs in November 1991, Dr. Melhorn diagnosed claimant as having upper extremity tendinitis bilaterally. He did not believe claimant had carpal tunnel syndrome at that time. He continued to treat claimant through 1992. He noted in April 1992 that claimant's symptomatology had worsened and, by May 1992, her problems had progressed up her forearms into the elbow region. Nerve conduction studies in July 1992 were positive for mild carpal tunnel syndrome. Dr. Melhorn did not provide an opinion regarding what, if any, functional impairment claimant might have due to her upper extremity problem. He was asked for an opinion regarding whether claimant's symptomatology could be measured before and after the May 1991 fall. He opined roughly 50 percent of claimant's problem was a result of the pre-May 1991 symptomatology with roughly 50 percent occurring after that date. He did not believe the fall on May 2, 1991 permanently aggravated claimant's condition.

It is significant that when Dr. Melhorn was asked what percentage of functional impairment claimant had before May 1991, he testified that he would not be able to say within a reasonable degree of probability.

K.S.A. 44-501 states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines the burden as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant's burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The medical evidence is not sufficient to carry claimant's burden of proving permanency from her injuries suffered while employed by U.S.D. No. 418. In order for claimant to be entitled to an award she must show by a preponderance of the credible evidence that she suffered accidental injury arising out of and in the course of her employment with respondent U.S.D. No. 418 and that that accidental injury resulted in a permanent, measurable condition for which claimant would be entitled to benefits. As neither Dr. Peterson nor Dr. Melhorn were able to say within a reasonable degree of medical probability what, if any, functional impairment stemmed from this series of injuries, the Appeals Board must find claimant has failed in her burden of proving that she suffered permanency from the series of accidental injuries through and including May 2, 1991 while employed with U.S.D. No. 418. The Appeals Board, nevertheless, does find it appropriate to assess U.S.D. No. 418 with the cost of any temporary total disability benefits and any medical care provided to claimant during claimant's employment with U.S.D. No. 418 and up to the date when claimant began her employment with The Cedars in December 1991. With regard to the award in this matter, to the extent the Administrative Law Judge granted reimbursement to U.S.D. No. 418 from The Cedars and its insurance company for any monies expended during the period before claimant began her employment with The Cedars, the Appeals Board herein reverses that portion of the award, with respect to that issue.

The medical evidence does support a finding that, upon beginning her employment with The Cedars in December 1991, claimant became involved in activities requiring bilateral upper extremity repetitive activity. The job duties required in claimant's employment with The Cedars were upper extremity intensive and did cause claimant's symptomatology to worsen to the point where claimant exhibited not only clinical symptoms of bilateral carpal tunnel syndrome, but also had positive EMGs and a noticeable thenar atrophy. Both Dr. Melhorn and Dr. Peterson felt claimant had aggravated or exacerbated her preexisting condition as a result of her physical activities with The Cedars. Again, Dr. Melhorn was not asked to provide a functional impairment rating, but Dr. Peterson testified that claimant had suffered a 15 percent whole body functional impairment as a result of these upper extremity injuries. The Appeals Board finds that the Administrative Law Judge, in granting claimant nothing less than her 15 percent functional impairment as assessed by Dr. Peterson, was correct and said finding is herein adopted by the Appeals Board.

K.S.A. 1991 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment."

Claimant's loss of abilities to perform work in the open labor market and to earn comparable wages were assessed and evaluated by two experts. Mr. Monty Longacre, claimant's expert, found claimant to have suffered a 63 percent loss of access to the open labor market. Mr. Ed Gaddis, respondent's expert, on the other hand, found claimant to have suffered a 16 percent loss of access to the open labor market.

The Appeals Board, in reviewing the opinions of Mr. Gaddis and Mr. Longacre, finds no compelling reason to place greater emphasis upon the opinion of one expert over the other and as such finds claimant, in comparing the two expert opinions, has suffered a 40 percent loss of access to the open labor market.

In reviewing claimant's loss of ability to earn comparable wages, Mr. Gaddis found claimant had suffered no loss. Mr. Longacre, on the other hand, found claimant had suffered a loss, but in reaching his opinion it is noted he utilized a preinjury average weekly wage of \$279.56. Per the stipulation of the parties, claimant's average weekly wage while working for The Cedars was \$183.58. Mr. Longacre opined claimant had the ability to earn \$180.00 per week postinjury. When comparing claimant's actual average weekly wage to the \$180.00 post-injury discussed by Mr. Longacre, the Appeals Board finds claimant suffered no loss of ability to earn comparable wages as a result of the injury on May 15, 1992 with The Cedars.

In determining the extent of permanent partial disability, both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. However, the statute is silent as to how this percentage is to be arrived at and what emphasis should be placed upon the prongs required to be considered. The Supreme Court, in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), found that while a balancing of the two factors is required there is no rule regarding what, if any, emphasis must be placed on each factor. The Court in Hughes did find that applying equal weight to each factor was appropriate in workers compensation cases in Kansas.

The Appeals Board finds no compelling reason to place greater emphasis on one factor over the other. Adopting the rationale of the Court in Hughes, the Appeals Board finds claimant has suffered a 20 percent permanent partial general body disability as a result of the injuries suffered while working for respondent The Cedars.

As claimant was assessed no permanent impairment in Docket No. 169,842 for the injuries suffered through May 2, 1991, a credit under K.S.A. 44-510a(Ensley) would not be appropriate and the same is herein denied.

It is further noted claimant requests future medical treatment for the injuries suffered through May 2, 1991. The medical evidence indicates claimant's ongoing symptomatology subsequent to her employment with The Cedars stems from her injuries suffered while

employed with The Cedars. As such, future medical stemming from the accidental injuries by claimant while employed with U.S.D. No. 418 is herein denied.

The Administrative Law Judge assessed all costs against The Cedars and its insurance company, Kansas Association of Homes for the Aging Insurance Group, Inc., and ordered that The Cedars and its insurance company reimburse U.S.D. No. 418 for any amounts previously expended. The Appeals Board modifies this award insofar as U.S.D. No. 418 shall be obligated to pay any and all medical expenses and temporary total disability costs paid to claimant for the period preceding claimant's employment with The Cedars in December 1991. With regard to any temporary total disability compensation or medical expenses incurred subsequent to claimant becoming employed with The Cedars in December 1991, the order of the Administrative Law Judge requiring The Cedars to reimburse U.S.D. No. 418 for any such amounts paid by U.S.D. No. 418 and its insurance carrier is affirmed and remains in full force and effect.

With regard to claimant's injury on May 15, 1992 in Docket No. 172,282 claimant is awarded future medical upon application to and approval by the Director.

AWARD

Docket No. 169,842

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated August 24, 1994 shall be, and hereby is, affirmed in part and modified in part and claimant, Kathleen Kimber, is granted an award in Docket No. 169,842 against U.S.D. No. 418 and its insurance carrier for temporary total disability benefits and medical expenses incurred before claimant's start of employment with The Cedars in December 1991. In all other respects claimant is denied award against U.S.D. No. 418 and its insurance carrier for the injuries to claimant's upper extremities suffered through May 2, 1991.

Docket No. 172,282

WHEREFORE, it is the finding, decision and order of the Appeals Board that the claimant is further granted award against The Cedars, Inc. and its insurance carrier, Kansas Association of Homes for the Aging Insurance Group, Inc., and the Kansas Workers Compensation Fund for an injury occurring on May 15, 1992, and is entitled to 35.86 weeks temporary total disability compensation at the rate of \$122.39 per week totaling \$4,388.91, followed by 379.14 weeks permanent partial general body disability at the rate of \$24.48 per week totaling \$9,281.35 for a 20 percent permanent partial general body disability, making a total award of \$13,670.26.

As of April 4, 1996, there would be due and owing claimant 35.86 weeks temporary total disability compensation at the rate of \$122.39 per week in the sum of \$4,388.91, followed by 167 weeks permanent partial disability general body disability at the rate of \$24.48 per week in the sum of \$4,088.16 for a total due and owing of \$8,477.07 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, the remaining balance of \$5,193.19 is ordered paid at the rate of \$24.48 per week for 212.14 weeks until fully paid or until further order of the Director.

Future medical may be granted upon proper application to and approval by the Director.

Unauthorized medical is granted in both Docket Nos. 169,842 and 172,282 upon presentation of an itemized statement justifying same.

Claimant's contract for attorney fees is approved insofar as it is not in contravention to K.S.A. 44-536.

The Cedars, Inc. is ordered to reimburse respondent U.S.D. No. 418 and its insurance carrier, Kansas Association of School Boards, for all funds expended by U.S.D. No. 418 in Docket No. 169,842 for the period subsequent to December 1991, claimant's start of employment with The Cedars.

Per the agreement of the parties, The Cedars, Inc. and its insurance carrier are ordered reimbursed by the Kansas Workers Compensation Fund for 50 percent of all funds expended in this matter.

The fees necessary to defray the expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against respondent The Cedars, Inc., and its insurance carrier 50 percent and the Kansas Workers Compensation Fund 50 percent to be paid as follows:

Owens, Brake & Associates	
Preliminary Hearing Transcript	\$ 275.40
Dated October 16, 1992	
Preliminary Hearing Transcript	\$ 96.92
Dated February 2, 1993	
Deposition of Dr. David Peterson	\$ 498.40
Dated November 16, 1993	
Deposition of Monty Longacre	\$ 458.56
Dated February 17, 1994	
Regular Hearing Transcript	\$ 570.70
Dated March 2, 1994	
	Total \$1899.98
Barber & Associates	
Deposition of Dr. Mark Melhorn	\$ 369.70
Dated March 3, 1994	
Metropolitan Court Reporters, Inc.	
Deposition of Ed Gaddis	\$ 500.00
Dated March 22, 1994	

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Rodney G. Nitz, Salina, KS
Jeffrey A. Chanay, Topeka, KS
Anton C. Andersen, Kansas City, KS
David G. Shriver, McPherson, KS
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director